

## Better Late than Never?

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BAM PPP PGGM Infrastructure Cooperative U.a. -v- National Treasury Management Agency & anor [2016] IEHC 546

This case dealt with the lawfulness of accepting tenders submitted by bidders after the deadline for submission had expired. The Contract related to the design and build, financing and maintenance for a number of buildings for Dublin Institute of Technology (DIT) at the Grangegorman campus. The project had an expected capital value of €180 - €200m, which was to be procured under a single PPP contract using the Negotiated Procedure.

BAM were one of 3 tenderers who submitted bids. The NTMA identified a competing tenderer, Eriugena (a consortium), as the Most Economically Advantageous Tender and wished to proceed to award them the Contract. BAM were notified of this decision in a letter from the NTMA which included the following paragraph:

*“The Authority wishes to note that at the time of submission of the Tender documents to Asite, the uploading of a small number of the Eriugena documents was not completed until shortly after the 5pm deadline on 28th November, 2014. Having investigated the matter, the Authority was fully satisfied that no unfair advantage was gained by Eriugena in the circumstances and the Authority exercised its discretion to accept the Eriugena Tender prior to the evaluation exercise commencing.”*

The central issue in this case was whether or not the NTMA were entitled under the Invitation to Negotiate (“ITN”) provisions, and the relevant legal rules, to accept a tender that was received in whole or in part after the expiration of the tender period. It is worth noting at this stage that Eriugena submitted a number of documents over an hour later than the deadline.

It was determined by the Courts that the key principles to consider in this matter were *equal treatment* and *proportionality*. While the NTMA had some discretion as set out in the ITN, it is imperative that the NTMA ensured that no advantage was given to any Tenderer as a result of late submission of documents and that a proportionate, fair and transparent response was taken. The NTMA had a responsibility to fully explore the reasons for and nature of late document submission before any decision is made.

It was determined that Under Section 7.1 of the ITN as part of the Compliance Check the NTMA had a discretion to accept documents/files submitted after the Tender deadline, and to treat a tender as compliant, where the lateness was due to clerical or administrative error or omission. Further, and in the alternative, the NTMA had a discretion under general law to accept late tender documents.

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The exercise of such discretion, whether under the ITN or the general law, was subject to the Authority not infringing the general principles of equal treatment, non-discrimination, proportionality and transparency.

This case highlights the fact that Public bodies do have an element of discretion, with regards to accepting late tender documents. However, to ensure that this cannot be disputed, it is advisable for the public body to clearly write that it has discretion within the procurement document itself, and even with this, it may still not fully protect itself from such a challenge being mounted. It is imperative therefore that lessons are learnt and that every Contracting Authority ensures that they give the necessary level of thought with regards to the process and ensure that they show internally and where required, externally, that they have kept to the general principles.

